IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-489

MARIO MIROLA,

Petitioner,

against

Hon. HOWARD E. BELL and ROBERT DAVIS,

Respondents.

No. 79-561

NEW YORK NEWS, INC.,

Petitioner,

against

Hon. HOWARD E. BELL and ROBERT DAVIS,

Respondents.

MEMORANDUM OF JUSTICE BELL IN OPPOSITION TO PETITIONS FOR CERTIORARI

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Questions Presented

1. Whether review should be denied where the decisions below, affirming the closing of a pretrial suppression hearing to the press and public, were consistent with this Court's decisions and were based on concurrent

findings of fact by two courts, the trial court and the Appellate Division, which the Court of Appeals of the State of New York found not to constitute an abuse of discretion?

2. Whether review should be denied because this case is not urgent and does not present novel questions while this Court has before it another case, *Richmond Newspaper, Inc.* v. *Virginia,* No. 79-243, in which such questions may properly be addressed?

Prefatory Statement

This Memorandum is submitted on behalf of Justice Bell in opposition to the petitions for writs of certiorari of Mario Merola, District Attorney of Bronx County, New York ("Merola"), and of New York News, Inc. ("News"), to review judgments of the Court of Appeals of the State of New York entered July 9, 1979. The judgments affirmed the denial of petitions by Merola and the News for writs of prohibition against Justice Bell to prohibit him from closing a pretrial suppression hearing to the press and public. *Matter of Merola* v. *Bell,* 47 N Y 2d 985 (1979), aff'g 68 A D 2d 24 (1st Dept. 1979).

Respondent Justice Bell has no personal interest in the instant litigation. He specifically encouraged petitioners to seek a State appellate court review of his ruling closing the pretrial hearings to the public, except immediate members of the defendant's and the victim's families, and to the press, while permitting daily release of transcripts of the hearing, after redaction by counsel,* with complete transcripts to be made available when defendant could no longer be prejudiced by them.

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* In its affirmance, the Court of Appeals advised that redaction was a non-delegable responsibility of the hearing court. 47 N Y 2d at 986.

On consent of all parties, Justice Bell granted a stay until their petitions were finally decided* in order to protect the public's interest in a trial open to the press and respondent Davis' ("defendant Davis") interest in a fair trial, free from prejudicial publicity (R.** 131-3).

Defendant Davis is the first 13 year old to be tried in adult criminal court under the 1978 amendments to New York's Penal and Criminal Procedure Laws. It was his motion to exclude the press from the pretrial suppression hearing upon which Justice Bell ruled.

The facts of the case are well set out in the majority opinion of the Supreme Court of the State of New York, Appellate Division, First Department, 68 A D 2d at 25-7. It should be emphasized that, as discussed below at p. 12, both the trial court and the Appellate Division made independent but concurrent findings of fact which were found not clearly erroneous by the Court of Appeals. Since both petitioners base their arguments in part on a tacit controvertion of the findings of the Courts below as to the extensiveness of publicity in this case and the manner in which the trial court exercised its discretion (Merola Petition at 14; News Petition at 11-12, 16), the Attorney General will summarize the evidence upon which those findings were based.

A. Extent of Publicity.

There was abundant evidence, most of it ignored by petitioners in their papers in this Court, that the case had "attracted widespread publicity," 68 A D 2d at 27.

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* The Court of Appeals "caution[ed] that the right of the defendant to a speedy trial is important and should not be sacrificed in the name of these collateral appeals." 47 N Y 2d at 987-8. That caution was a general advisory note for other trial courts in similar situations and not applicable herein since the defendant had waived his speedy trial rights by consenting to the stay.

** Reference is to the Record on Appeal in the Court of Appeals.

In considering the level of publicity, it is important to note that the Record does not contain all of the news coverage of this case. Counsel for defendant Davis had included ten *illustrative* articles from the daily press in his Affirmation in Answer to the Petitions (R. 212-3, 218-27), but made no pretense of completeness. The most obvious omission from the Record was any attempt to quantify broadcast coverage of the proceedings.

The Record shows that the March 19-20, 1979, hearing was covered in one newspaper story and at least four radio and two television reports (R. 213). Using this one to six ratio of newspaper to broadcast coverage as a basis, the fact that there had been more than ten newspaper articles before the March 19-20 hearing would suggest over sixty electronic media reports before then. Accordingly, as of March 20th, the Record documents at least eleven newspaper articles, four television reports and two radio stories; it indicates that there were several other newspaper articles; and it supports a reasonable estimate of at least sixty other electronic media reports.*

Considering the newspaper and broadcast coverage of just the March 19th hearing, over half the households in the Bronx were exposed to stories about it in that twenty-four hour period alone.** Continued coverage over a

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* Although the six to one ratio of broadcasts to articles may at first seem out of proportion, the actual number of electronic media reports is probably *under* rather than over-estimated. The Davis case was the type of story that lent itself to quick, short, broadcast coverage. It was reported by the wire services which provide hourly bulletins to the more than seventy radio and thirteen television stations, *Standard Rate and Data Service, Inc.* (April 1979) at 600, serving New York City. On the "all news" stations, at least, any one story was likely to be repeated several times.

** This estimate is based on the newspaper circulation, *Circulation 78/79*, at 527, and radio and television audience figures, *Nielsen* (Feb. 1979); *ARB* (Jan. 1979), for the specific news-

(footnote continued on following page)

three or four day suppression hearing (R. 131) could reasonably have been expected to reach virtually every Bronx adult.

There was thus ample reason for Justice Bell to comment that "this case, of course, was extensively covered by the press at the time the defendant was arraigned in this Courtroom in November of 1978. . . ." (R. 113). As Justice Sullivan summarized it, 68 AD2d at 25:

> "Notwithstanding a newspaper strike in New York City, defendant's initial court appearances received extensive coverage on television and radio, and in the nonstriking newspapers. It was reported that he was the first juvenile to be charged with murder under the State's 'tough new juvenile crime law' and the youngest person ever so to be charged in the State of New York. This coverage continued with his subsequent arraignment on the indictment. One of the newspaper articles carried the headline 'He's a killer! Widow in court outburst!' ".

The publicity in *Matter of Gannett Co.* v. *De Pasquale*, 43 N Y 2d 370 (1977), aff'd —— U. S. ——, 47 USLW 4902 (July 2, 1979), was found pervasive based on continuing coverage in the local press, sometimes on the front page, and on the local networks. In the Davis case, the articles were not on the front page, but the known television broadcasts were on prime time evening news and the known radio broadcasts were on prime time ("drive time") morning

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(footnote continued from preceding page)

papers and programs known to have reported the hearing. A statistical adjustment has been made on the assumption that a random number of persons exposed to one report will also have been exposed to another report from a different source. Thus, the estimate that over half the county's households were exposed to at least one report of the hearing includes a substantial number of households that were exposed to two or more such reports. It is an unduplicated, not a cumulative estimate.

news. Whenever court action took place in this case, at arrest, at arraignment, and again at the pretrial proceedings, the press covered it.

Attempts by petitioners in this Court to rely on supposedly limited publicity at the case's initial stages ignore the crucial fact that although the major newspapers were then on strike, the interim newspapers nonetheless gave the story extensive coverage. See illustrative stories at R. 218-26. Moreover, by the time of the pretrial hearing, the major dailies had resumed publication. Attempts by petitioners to rely on the lack of publicity between arraignment and the March 19th hearing likewise ignore the crucial fact that there had been nothing for the press to report during that period. But on the first occasion after the major newspapers resumed publication that there was a newsworthy event, representatives from television station Channel 11 (R. 40-1), radio station WNBC (R. 41), CBS News (R. 60), television station WABC Eyewitness News (R. 139), United Press International (R. 60, 69), the News itself (R. 70), the New York Post (R. 78), and other unidentified members of the press, attended, presumably with the intention of filing stories. Of these, at least Channel 11, WNBC and the Post had broadcast or published stories within twenty-four hours of the March 20th hearing (R. 40-1, 139). If it had been possible to monitor all the electronic media, undoubtedly much more news coverage could be cited. See, pp. 4-5, *supra.*

Clearly, the Davis case was receiving as extensive publicity as in *Gannett.* The presence at the March 20th hearing of so many reporters from so many news sources presented Justice Bell with a clear and present danger of more publicity of the same character.

Indeed, the peculiarly prejudicial way in which the press on March 19-20th was linking the Davis case with independent acts by others in similar settings made the need to exclude the media even stronger than in *Gannett.*

As Justice Sullivan noted, 68 A D 2d at 26:

> "That evening [March 19] various television and radio stations broadcast stories about a new crackdown by the Mayor of the City of New York on crime in the subways. Interspersed with these accounts were reports of defendant's trial. The next morning, prior to the commencement of the hearing, the Trial Justice advised counsel that he had viewed a telecast the evening before about the efforts to increase police protection on the subways, which concluded with the comment 'Too bad they didn't have that back in September when Davis allegedly participated in the killing of John Hernandez.' The comment was followed by a showing of a wedding picture of the deceased Hernandez and his wife. The Trial Justice also stated that he had heard a radio report that morning that pretrial hearings were being conducted in the Davis trial, and that the People would seek to introduce a videotaped statement by defendant in which he admitted to the killing of Hernandez. At about the same time that the Trial Justice was voicing these concerns the morning edition of that day's New York Post, carrying a story headlined 'Videotape is Key in Teenager Trial', under an artist's sketch of defendant with his mother in the courtroom, was already on the newsstands."

Justice Bell noted that the press was explicitly identifying the Davis case as a "subway crime" (R. 114-6). The pervasive publicity about "subway crime" was creating a situation in which it would be increasingly difficult to ensure a fair trial for persons accused of a "subway crime." The use by the press of Davis as the exemplar of "subway crime" risked his being identified in the public mind with every other such case reported.

Under *People* v. *Moore,* 42 N Y 2d 421, 433, cert. den. 434 U.S. 987 (1977), Justice Bell had to consider possible

prejudice to defendant Davis from reference to his pending prosecution in articles about similar crimes. While Justice Bell correctly found (R. 101-2) that the publicity to date would not prevent a fair trial, he had to consider both the publicity about the Davis case and publicity about similar crimes which the press had linked to it in evaluating the type of publicity that might reasonably be foreseen over the suppression hearing.

A further factor supporting the finding of the Courts below as to the likelihood of prejudice based on the reasonably foreseeable publicity was the nature of the evidence to be considered at the suppression hearing. In closing the hearing, Justice Bell was concerned with not merely one or two pieces of tainted evidence that might have to be excluded in a one day hearing. Rather, he faced a three or four day hearing on the admissibility of a series of five cumulative statements, all of which the District Attorney intended to introduce at trial (R. 58-9, 131). Justice Bell was particularly concerned that one statement was on videotape. As he said,

> ". . . frankly as a profession[al], and you are a professional in the field of law, videotapes are very impressive. Frankly, they are more impressive than a policeman getting on the stand testifying that this man told me, 'yes, I did it.' When you sit in a courtroom and look at that man on the t. v. camera, and he said yes . . . If you have laymen over there who have not seen these videotape confessions, they may be over-impressed by it, and the[y] will say, 'here's a man, I watched him on t.v.,' and that looks like a regular t.v., 'I watched him on t.v., he was cool, he was calm as he told that story, no question in my mind that he understood what he was doing, no question in my mind about that,' and your paper, not your paper but the press really should headline—this is what gives me, and it's my problem. . . ." (R. 92-5).

Justice Bell was clearly concerned that the videotape is a uniquely prejudicial piece of evidence. He believed there was a real danger that it would be given excessive weight by the press, leading them to give additional prominence to the story. He was explicitly concerned that this type of publicity might cause prospective jurors to lie about their prior knowledge of the case or to swear falsely that they would wipe it from their minds (R. 95-7).

B. Exercise of Discretion.

The thoroughness with which Justice Bell explored alternatives to cloture is ample demonstration that he carefully exercised his discretion.

He specifically authorized the families of the defendant (other than the mother, who was to appear as a witness) and the deceased victim's wife to remain during the hearing (R. 117-9). He specifically agreed to "make available redacted transcripts of the proceedings during the pretrial motions" (R. 117).

He conscientiously explored several other alternatives with petitioners and defendant (R. 122), although under *Gannett* he did not have to, 43 N Y 2d at 380. The possibility of continuance was eliminated because of the Assistant District Attorney's pregnancy (R. 127-8) and the defendant's right to a speedy trial (R. 125-6). Justice Bell's suggestion that he might initially open the hearings to the press and close them if prejudicial publicity occurred, adjourning for a few months, was rejected for the same reasons (R. 125-8).

The trial court did not explore change of venue because it would clearly be more prejudicial to the defendant than the publicity. As defendant's counsel argued, defendant Davis was only 13 years old and needed the support of his family in court (R. 79-80); concurring opinion of SANDLER, J., 68 A D 2d at 30. But only those family members who were to be witnesses, and who therefore would be excluded

from most of the trial, would have had their expenses paid to attend if venue was changed from the metropolitan area that had been blanketed with publicity about the case.

Voir dire and limiting instructions were properly rejected since Justice Bell had cause to believe they would not adequately protect the impartiality of the jury (R. 95-7). Sequestration of the jury was not explored since no jury had been chosen and sequestering a jury panel of one or two hundred people is impracticable. Nor would it be practical to choose a jury in advance of the hearing and sequester it: there might well be an appeal over the suppression of evidence at the hearing. Criminal Procedure Law §§ 450.20, 450.50, 710.20. Discharging the jury during the appeal would cause problems of double jeopardy, sequestering them for so long a period would be likely to prejudice them, and releasing them during the appeal would expose them to prejudicial publicity about "subway crime" in general and the Davis case before trial.

The order granted by Justice Bell was thus narrowly drafted and well within his discretion. It gave the public and press full access to the trial and only partially limited their access to the suppression hearing.

C. Conclusion.

There was thus substantial convincing evidence in the record before the three Courts below to support their findings of extensive publicity to date and a likelihood of further widespread publicity of a prejudicial nature if reports of the pretrial hearing were published before the jury was impanelled. Based on that record, the order for cloture, after consideration of alternative means of protecting societal interests, was a reasonable exercise of discretion.

POINT I

Review should be denied of petitioners' First and Sixth Amendment claims because the decisions below, affirming the closing of a pretrial suppression hearing to the public and the press, were consistent with this Court's decisions and were based on concurrent findings of fact by two Courts, the trial court and the Appellate Division, which the Court of Appeals of the State of New York found not to constitute an abuse of discretion.

In *Gannett Co.* v. *De Pasquale,* —— U.S. ——, 47 USLW 4902 (July 2, 1979), this Court affirmed the closing of a pretrial suppression hearing to the press and public. It held that the Sixth Amendment right to a public trial was conferred only on a criminal defendant, 47 USLW at 4707, and that even if the Sixth Amendment, through the Fourteenth Amendment, "could properly be viewed as embodying the common-law right of the public to attend criminal trials," that right did not extend to pretrial proceedings which "were never characterized by the same degree of openness as were actual trials," *id.* (footnote omitted). The Court found it unnecessary to address the question of the petitioning newspaper's putative First Amendment right, through the Fourteenth Amendment, to access to the pretrial proceeding where the denial of access was temporary and the trial court had held a hearing at which it balanced the competing social interests in access with the defendant's right to a fair trial. 47 U.S.L.W. at 4908-9.

In the present case, the denial of access was similarly limited, 68 A D 2d at 28, and followed a trial court hearing addressed to the same First and Sixth Amendment concerns, *id.* at 26-7.

The present writs of prohibition originated in the Appellate Division which thus was sitting as a court of first

instance and properly made its own findings of fact in reviewing the trial court's ruling on the law and on the facts, New York Civil Practice Law and Rules § 7803. Based on its own review of the record, the Appellate Division found substantial evidence to support the trial court's ruling and upheld it as a reasonable exercise of discretion. 68 A D 2d at 30. The fact that the dissenting Justices argued cloture was an abuse of discretion, 68 A D 2d at 35-6, shows that the issue was firmly in contention.

In the Court of Appeals, where the issue of discretion was briefed (Brief for Respondent-Respondent Justice Bell at 19-23) and addressed at oral argument, the Court affirmed. Its decision amounted to a holding that the trial court's exercise of discretion was not contrary to the weight of the uncontroverted evidence as a matter of law.*

The decisions in this case on the First Amendment claim thus clearly comport with this Court's decision in *Gannett*. The trial court's cloture order was on motion of the defendant, followed a careful hearing directed at the competing social interests in press access to the pretrial proceeding and the defendant's right to a fair trial, and was limited both in duration and as to those excluded from the courtroom. See p. 2 *supra*. Here, as in *Gannett*, "the actions of the trial judge . . . were consistent with any right of access the petitioner[s] may have had under the First and Fourteenth Amendments," 47 USLW at 4908.

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* The New York Court of Appeals ordinarily reviews decisions of the courts below only on the law. Where, however, it is claimed that the trial court's exercise of discretion was clearly contrary to the weight of the uncontroverted evidence, a matter of law is presented for review. Cohen & Karger, *Powers of the New York Court of Appeals* (1952) § 158, at 614-9, and cases cited. Cf. *Krichmar* v. *Krichmar*, 42 N Y 2d 858, 860 (1977). Its affirmance herein thus amounts to a holding that the trial court's exercise of discretion, as approved by the Appellate Division, was not clearly contrary to the weight of the uncontroverted evidence.

The decisions herein on petitioners' Sixth Amendment claim were likewise consistent with *Gannett*. While this Court did not specifically address the Sixth Amendment claim of a prosecutor on behalf of the public to a pretrial hearing open to the press and general public, *Gannett* clearly held that any such right was personal to the defendant, 47 USLW at 4707-8. Since the defendant herein sought cloture, neither the newspaper nor the prosecutor could invoke his constitutional right to an open hearing over his objection. See *Rakas* v. *Illinois*, 439 U S 128, 132 n.2 (1979); *McGowan* v. *Maryland*, 366 U S 420, 429 (1961), citing *United States* v. *Raines*, 362 U S 17, 22 (1960), and *Tileston* v. *Ullman*, 318 U S 44, 46 (1943). See also *Donaldson* v. *United States*, 400 U S 517, 530 (1971); *United States* v. *A. L. Burbank & Co., Ltd.*, 525 F 2d 9, 17 (2d Cir. 1975).

Assuming *arguendo* that petitioners could raise a Sixth Amendment claim, this Court's decision in *Gannett* clearly shows that the claim would be rejected. The Court specifically noted that, 47 U.S.L.W. at 4906 n. 12:

> "The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same dual obligation."

In *Gannett*, the "public interest [was] fully protected by the participants in the litigation," *id.* at 4906.

In the present case, the trial court heard argument from the newspaper, prosecutor and defendant on the Sixth Amendment issue. Its decision was approved on the law and the facts and as a reasonable exercise of discretion by the Appellate Division. The Court of Appeals affirmed, having rejected the claim of abuse of discretion. Thus, the public interest was adequately protected under this Court's standard in *Gannett*.

This Court has noted:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

Moreover, this Court has held that it

> "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949). Accord, *United States* v. *Ceccolini,* 435 U.S. 268, 273 (1978); *Berenyi* v. *Immigation Director,* 385 U.S. 630, 635 (1967).

As shown above, the trial court's cloture order was based on substantial evidence of widespread publicity and potential prejudice. That holding was affirmed on the law and the facts by the Appellate Division. Any hypothetical error in it was found not to amount to an abuse of discretion by the Court of Appeals.

The cloture decision came within the law as later enunciated by this Court in *Gannett.* It was based on concurrent findings of fact by two courts and found not to be clearly erroneous by a third court. Under this Court's standards for granting writs of certiorari, review should be denied.

POINT II

Review should be denied because this case is not urgent and does not present novel questions. Moreover, this Court has before it another case in which such questions may properly be addressed.

Defendant Davis' guilty plea without a pretrial suppression hearing removes the urgency from this case. He has received a restrictive placement disposition pursuant to Family Court Act § 753-a for a designated Class A felony

act under which he will be held in a secure juvenile facility for at least eighteen months and may be retained in custody until his twenty-first birthday. While we believe the decisions below would be upheld if this Court granted review, it is important to note that even a reversal herein would not entitle defendant Davis to a new trial, much less to go free.

Petitioners attempt to show their own need for review based on questions allegedly left open by *Gannett* that this case might answer. Merola Petition at 13-15; News Petition at 10-12, 19-21. But, as shown above, *Gannett* already provides sufficient guidance to answer those questions. Specifically, *Gannett* shows that the Courts below herein correctly approved the trial court's decision, after a full hearing, resolving the competing First and Sixth Amendment issues, even over the prosecutor's objections. See pp. 12-13 *supra.*

To the extent that a question was left open in *Gannett* as to the significance of the size of the jury pool, News Petition at 16-18, that was a factual issue resolved against petitioners by concurrent rulings of the three Courts below and not suitable for review. See p. 14 *supra.*

Petitioner News also suggests that *Gannett* left open the question of the appropriate standard to apply and that the decisions herein do not meet a reasonable probability of prejudice standard. News Petition at 12-16. But, as shown at pp. 3-10 *supra,* it was not clearly erroneous for the Courts below to find such a reasonable probability of prejudice based on the showing made by the defendant and after consideration of alternative remedies. The trial court's decision met Mr. Justice Rehnquist's broad standard of deference to the trial court's discretion, 47 U.S.L.W. at 4912; the reasonable probability standard of the Chief Justice and Justices Stewart and Stevens, *id.* at 4909; and Mr. Justice Powell's standard placing the burden on defendant to show a reasonable probability of

prejudice and consideration of less restrictive alternatives, *id.* at 4911. It thus comported with the *Gannett* standards enunciated by a majority of the Court and needs no review.

Even if this Court were prepared at this early date to reconsider *Gannett,* it has before it for decision this Term another case, *Richmond Newspaper, Inc.* v. *Virginia,* No. 79-243, review granted 48 U.S.L.W. 3241 (Oct. 9, 1979), which squarely frames the question of standards. Review of the instant case, which is not urgent and where review of most issues would be limited by the concurrent factual rulings of three Courts below, is thus unnecessary and inappropriate.

CONCLUSION

The petitions for writs of certiorari should be denied.

Dated: New York, New York
November 2, 1979.

Respectfully submitted,

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